

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KAREN MOE HUMPHREYS,

No. C-04-03808 SI (EDL)

Plaintiff,

**ORDER GRANTING IN PART  
PLAINTIFF'S MOTION TO COMPEL  
PRODUCTION OF DOCUMENTS ON  
PRIVILEGE LOG**

v.

REGENTS OF THE UNIVERSITY OF  
CALIFORNIA, et al.,

Defendants.

On April 3, 2006, Judge Illston ordered Defendants to produce a privilege log: "To comply with their discovery obligations, defendants must either produce a privilege log or suffer a waiver. Accordingly, the Court ORDERS defendants to produce their privilege log **no later than April 7, 2006**; if they do not do so, the privileges they assert will be waived." Apr. 3, 2006 Order at 3:22-24 (emphasis in original). After Defendants produced a privilege log in response to this Order, Judge Illston stated in a further Order that: "'While the privilege log lacks any sort of description of the subject of many of the documents, the Court believes that the privilege log contains sufficient information to constitute a good faith effort at compliance with this Court's order.'" However, Judge Illston also found that the log "contained suspiciously few documents," and referred the matter to this Court to make sure the log was complete. May 22, 2006 Order at 2:14-16, 2:19, 2:22-23.

Pursuant to this Court's June 15, 2006 Order, Defendants filed a revised privilege log on June 19, 2006 containing twenty-nine entries for withheld documents and thirty-nine entries for redacted documents. On July 18, 2006, Plaintiff filed this motion seeking production of most of the privilege log documents on the grounds that they are either not privileged or the privilege has been waived. After Plaintiff filed this motion, Defendants produced items 15, 16 and 26 from the log. With respect to the documents that Plaintiff does not seek to compel, Plaintiff seeks an in camera

1 review to determine if the documents are properly on the privilege log. Defendants opposed this  
2 motion and Plaintiff filed a reply.

3 On August 9, 2006, the day after Plaintiff's reply was filed, Defendants provided an  
4 addendum to the privilege log including documents that had been recently uncovered as Defendants  
5 were searching computer server paths pursuant to this Court's Order to do so. The addendum  
6 contains thirty-five previously undisclosed documents, many of which are drafts of documents  
7 already listed on the June 19, 2006 privilege log. The Court permitted further briefing regarding the  
8 documents on the addendum. Because this matter was appropriate for decision without oral  
9 argument, the Court vacated the August 22, 2006 hearing.

10 **Privilege Log Entry 10:** Defendants asserts the attorney-client privilege for this document,  
11 but none of the authors or recipients on this e-mail chain appear to be attorneys. Defendants state  
12 that they communicated to Plaintiff that the request for information in the e-mail came from outside  
13 counsel, so the document is privileged. No later than September 15, 2006, Defendants shall amend  
14 the privilege log to reflect a complete description of this e-mail chain and provide the document to  
15 the Court for in camera review.

16 **Privilege Log Entry 11:** Defendants assert third party privacy rights for this document,  
17 which is described as a handwritten note with names and phone numbers of students. This  
18 document has apparently been produced, but in a redacted form. Records from student files are  
19 entitled to heightened protection under federal law. See Owasso Indep. Sch. Dist. No. I-011 v.  
20 Flavo, 534 U.S. 426, 428-29 (2002); 20 U.S.C. § 1232g. However, Defendants have previously  
21 produced to Plaintiff documents containing identifying student information under a protective order,  
22 which are subject to redaction if they are filed with the Court. This document should be treated in  
23 the same manner and, if filed with the Court, shall be redacted to conceal the names, personal  
24 identifying information, financial information and/or medical information of students.

25 **Privilege Log Entry 12:** Defendants assert the attorney-client privilege for this document,  
26 entitled "Confidential - Intercollegiate Athletics: Draft Summary of Fact Finding Investigation to  
27 Date." Defendants have waived any privilege that arguably may have attached to this document for  
28 two reasons. First, a University investigator answered questions about this draft document during

her February 24, 2006 deposition and defense counsel did not object. See Sinclair Decl. Ex. N; McCormick on Evid. § 93 (6th ed.). Second, this document was publicly filed on May 3, 2006 and remains available on the Alameda County Superior Court website in connection with another case against these Defendants. Defendants claim that the document was inadvertently produced, but Defendants' request to seal that document has been denied twice by the Superior Court. Despite the Superior Court's rulings, Defendants now ask this Court to find that the document was inadvertently produced and to order its return to Defendants. Even if Defendants did not intend to waive the privilege (see Weil v. Investment/Indicators, Research & Management, 647 F.2d 18, 24 (9th Cir. 1981) ("the subjective intent of the party asserting the privilege is only one factor to be considered in determining whether waiver should be implied.")), other circumstances warrant a finding of waiver. Notably, Defendants did not seek to seal the document in the Superior Court or to include it on a privilege log in this case until almost six weeks after learning of its production. In addition, the listing of this document on the original privilege log was misleading, describing it as "Minutes and agenda," which only relates to a cover page while the document itself is clearly labeled as a draft summary of an investigation.

Moreover, there is evidence that Defendants made representations to Judge Illston that were not correct regarding statements in the draft summary, especially the statement that "women need to be beaten." First, Defendant stated in an April 2006 motion in limine that it was "unaware when, where, or by whom this statement was allegedly made." Apr. 18, 2006 Motion in Limine Number 16 at 1:24-25. Second, Defendants stated in their April 10, 2006 Reply to their Motion for Summary Judgment that "there is no support for the inflammatory comment about women being beaten." Apr. 10, 2006 Reply at 9:5. Yet the December 2002 draft summary attributes the statement that "women should be beaten early" to "AD," who Plaintiffs state in their brief is the Athletic Director (Gladstone) and Defendants do not deny that attribution.<sup>1</sup> Defendants now seek to downplay these statements as mere argument, not an incorrect statement of fact, as if it were acceptable to mislead a

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<sup>1</sup> Defendants also argued that "Plaintiff cannot prove that any decision-makers made derogatory comments about women" and that "no documents exist that show such comments were made," citing Plaintiff's deposition testimony. See Defs.' Mot. for Summ. J. at 10:4-7 (docket number 113). While it is true that Plaintiff did not have the evidence, Defendants knew it existed.

1 court in argument.

2 Accordingly, Plaintiff's motion to compel production of privilege log entry number 12 is  
3 granted.

4 **Privilege Log Entries 13 and 14:** According to Defendants, these are separate reports of the  
5 Sawyers investigation that were provided to attorney Smith so he could provide legal advice to  
6 Defendants. To the extent that they are subsequent versions of the December 2002 draft summary,  
7 privilege has been waived as to these documents because they are within the subject matter of the  
8 draft summary. Weil v. Investment/Indicators, Research and Management, Inc., 647 F.2d 18, 24  
9 (9th Cir. 1981) (recognizing that voluntary disclosure of the content of an attorney-client  
10 communication waives the attorney-client privilege as to all other communications on the same  
11 subject matter). Moreover, with respect to entry 14, Defendants produced notes of a meeting on  
12 February 4, 2003, the same date as entry 14, showing that the subject of the Sawyers investigation  
13 and the report were extensively discussed. See Wagner Decl. Ex. C at 2155-56.

14 Further, by affirmatively pleading as a defense that any actions taken by Defendants were  
15 taken after investigation, Defendants have waived privilege as to all documents relating to that  
16 investigation. See Walker v. County of Contra Costa, 227 F.R.D. 529 (N.D. Cal. 2005) ("Where a  
17 party puts the adequacy of its pre-litigation investigation at issue by asserting the investigation as a  
18 defense, the party must turn over documents related to that investigation, even if they would  
19 ordinarily be privileged."). Defendants argue that the affirmative defense based on investigation  
20 was for "defendant's position that the elimination of Athletic Department positions was based upon  
21 an investigation of the need for those positions, in light of the budget crisis," not for the Sawyers  
22 investigation, and that the defense was asserted long before Plaintiff alleged retaliation based on  
23 comments made by her to Sawyers investigators. On its face, however, this defense is not limited to  
24 the elimination of positions, and it was asserted in answer to the second amended complaint, which  
25 alleged gender discrimination. Also, if Defendants believed the defense did not apply once Plaintiff  
26 amended her complaint, Defendants should have amended the answer. In fact, the defense  
27 specifically refers to "any actions alleged by plaintiff to have been made or done by defendants."

28 Accordingly, Plaintiff's motion to compel production of privilege log entries 13 and 14 is

1 granted in part. Defendants shall produce those documents except that they may redact actual legal  
2 advice.

3 **Privilege Log Entries 17-25, 27-29:** Plaintiff argues that these documents, which appear to  
4 be various letters and e-mails among University personnel and counsel regarding Plaintiff's claim,  
5 should be produced because any privilege has been waived because they were not listed on the  
6 original log. Defendants argue that these documents, which are all dated in 2004, were inadvertently  
7 left off the original log, but have not provided a viable explanation for their inadvertence.  
8 Accordingly, even applying the holistic approach to waiver of Burlington Northern & Santa Fe  
9 Railroad Co. v. United States District Court, 408 F.3d 1142, 1148-49 (9th Cir. 2005), the  
10 circumstances of this case warrant finding waiver of the attorney-client privilege. However, to the  
11 extent that there are documents reflecting attorney-client communications made after this litigation  
12 was filed, those documents may be withheld without being listed on the privilege log. Therefore,  
13 Plaintiff's motion to compel production of entries 17-25 and 27-29 is granted in part. Defendants  
14 shall produce entry 17, which is dated before the start of this litigation. Entries 18-25, 27 and 29  
15 need not be produced as they are post-litigation documents. Entry 28 is an e-mail chain containing  
16 messages from before and after the commencement of litigation; Defendants shall produce this  
17 document for in camera review no later than September 15, 2006.

18 **Documents redacted on privacy grounds:** Plaintiff argues that redacted documents 1-5  
19 and 33-37, which have been redacted on privacy grounds, should be produced in non-redacted form.  
20 Most of the documents contain student addresses and phone numbers that have been redacted based  
21 on the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. The student  
22 information should not be redacted from the documents but, as described above, if the documents  
23 are filed in court, the filing party should redact the identifying information.

24 Defendants redacted document 37 based on the right to privacy of a third party  
25 whistleblower complaint involving a man unrelated to the athletics department. Plaintiff is entitled  
26 to his name, although the name and other identifying information should be redacted in any court  
27 filings.

28 **Production in camera of privilege log entries 1-9:** Plaintiff asks the Court to review the

1 remaining log documents (and any others that are not ordered produced) in camera to confirm that  
 2 they are actually privileged because Defendants' prior logs have been misleading in their document  
 3 description. Although these documents appear to be privileged based on the log's descriptions, the  
 4 Court is mindful that Defendants have provided inadequate log descriptions in the past (compare  
 5 April 7, 2006 Log Entry number 12 with June 19, 2006 Log Entry number 12) and, after this motion  
 6 to compel was filed, produced three documents that they previously listed on the June log as  
 7 privileged. Therefore, the Court will review log entries numbers 1-9 in camera. Defendants shall  
 8 submit these documents no later than September 15, 2006.

9 **Addendum to privilege log:** On August 9, 2006, Defendants provided an addendum to the  
 10 privilege log including thirty-five additional documents that it found on an archive CD which it  
 11 discovered when it began to preserve the server paths as required by this Court's Order. The thirty-  
 12 five items on the Addendum relate to the Sawyers investigation by University personnel in 2002-  
 13 2003. Defendants argue that Addendum Entries 2-20 and 31-33 are drafts of privilege log numbers  
 14 13 and 14, and that Addendum Entries 21-28 and 34-35 are draft versions of privilege log numbers  
 15 12. See Defs.' Supp. Brief at 4:13-14. The other three addendum documents (entries 1, 29 and 30),  
 16 according to Defendants, are either part of the privilege log documents 12-14 or communications  
 17 between attorney and client regarding legal advice with respect to the privileged reports. These  
 18 documents are either dated before this litigation was filed or have no date. Because the Court has  
 19 found that the attorney-client privilege has been waived with respect to Privilege Log Entries 12-14,  
 20 the Addendum documents are within the same subject matter (in fact, some appear to be copies or  
 21 drafts of the draft summary itself) and so are included in the waiver.

22 **IT IS SO ORDERED.**

23 Dated: September 11, 2006

*Elizabeth D. Laporte*  
 ELIZABETH D. LAPORTE  
 United States Magistrate Judge